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MPPL & Anor v CAS

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(W)-1051–05 OF 2021
VAZEER ALAM, GUNALAN MUNIANDY AND MOHD NAZLAN JJCA
11 APRIL 2023

C

Evidence — Proof of — Paternity — High Court allowed respondent's application to conduct DNA test to determine paternity of child — Whether respondent established that he had sexual relations with first appellant during period when child was conceived — Whether High Court had power to order blood test of child to determine paternity via DNA test — Whether it was in child's welfare and best interest to order DNA test — Evidence Act 1950 s 57(2)

D

This was an appeal by the appellants against the decision of the High Court in allowing the respondent's application for a DNA test to be conducted to determine the paternity of a child ('the child'). The respondent claimed that he was the biological father of the child despite the mother of the child ('the first appellant') being lawfully married to the second appellant at the time the child was born. The issues arose were: (a) whether the respondent had made out a prima facie case that he had sexual relations with the first appellant during the period when the child was conceived ('the conception period'); (b) whether the High Court had the power to order a blood test on the child to determine paternity via DNA testing; and if so, (c) whether it was in the child's welfare and best interests to order the DNA test.

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Held, dismissing the appeal, affirming the order of the High Court, and allowing stay of High Court's order and Court of Appeal's order pending disposal of appellants' leave application to the Federal Court:

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(1) The court agreed with the High Court that in addition to the fact of sexual relations during the conception period, the person asserting that claim of paternity may produce other additional evidence, oral or documentary, to support that assertion, before the court grants the order that the relevant parties, ie the child and the putative biological father, undergo DNA testing to determine paternity. The court further agreed with the High Court in referring to s 57(2) of the Evidence Act 1950 to rely on respectable medical journal to determine the conception period. Based on the finding of the High Court, the conception period in the present case was between 13 September 2007 to 20 October 2007 (see paras 17–18).

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(2) The learned trial judge found that the respondent had proved on a balance of probabilities that: (a) he had intimate sexual relations with the first appellant prior to and during her marriage to the second appellant until January 2014; (b) he had unprotected sexual intercourse with the first appellant during the child's conception period; (c) the first appellant had told him and his mother that he was the father of the child; (d) he had access to and was involved in the child's life since her birth until December 2013; and (e) he had provided the first appellant monies for the child's maintenance until she closed her Maybank account sometime in August 2014. These were essentially findings of fact by the trial judge and an appellate court should be slow to disturb such findings of fact unless it was shown that the trial judge was plainly wrong. The court did not find the trial judge to have made any error in her finding that the respondent did have sexual relations with the first appellant during the conception period (see paras 26–27).

(3) The court agreed with the findings and ruling of the learned High Court judge on the application of the common law principle that as 'parens patriae' the High Court had general inherent powers over a child to make any order that would be in the best interest of the child, and that this would include the power to order that a child undertake a DNA test for the purposes of determining his or her paternity. This common law principle would be applicable in Malaysia by virtue of s 3(1) of the Civil Law Act 1956 which allowed for the import of the common law of England as at 7 April 1956 subject to the limitations spelled out in that statutory provision (see paras 40–41).

(4) The court was bound by the doctrine of stare decisis to apply the principle in the Court of Appeal's case of *CAS v MPPL & Anor* [2019] 4 MLJ 243. The court therefore agreed with the learned trial judge that it would be in the best interests of the child to know who her biological father was. The right of a child to know his or her biological parents is now internationally recognised as a basic right of critical importance to a child. The child has a right to know the truth of his or her origin, and in this regard, where appropriate the High Court must exercise its inherent jurisdiction of 'parens patriae' to assist the child to know that truth. The court agreed with the learned trial judge that given the facts and circumstances of the case this was such an appropriate case (see paras 42–43).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu-perayu terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden untuk ujian DNA dijalankan untuk menentukan paterniti seorang kanak-kanak ('anak tersebut'). Responden mendakwa bahawa dia adalah bapa kandung anak tersebut walaupun ibu kepada anak tersebut ('perayu pertama') telah berkahwin secara

A sah dengan perayu kedua pada masa anak tersebut dilahirkan. Isu-isu yang timbul ialah: (a) sama ada responden telah membuktikan kes prima facie bahawa dia melakukan hubungan seksual dengan perayu pertama dalam tempoh ketika anak tersebut dikandung ('tempoh mengandung'); (b) sama ada Mahkamah Tinggi mempunyai kuasa untuk memerintahkan ujian darah ke B atas anak tersebut untuk menentukan paterniti melalui ujian DNA; dan jika ya, (c) sama ada adalah demi kebajikan dan kepentingan anak tersebut untuk memerintahkan pelaksanaan ujian DNA tersebut.

C **Diputuskan**, menolak rayuan, mengesahkan perintah Mahkamah Tinggi, dan membenarkan penangguhan perintah Mahkamah Tinggi dan Mahkamah Rayuan sementara menunggu pelupusan permohonan kebenaran Mahkamah Persekutuan oleh perayu-perayu:

(1) Mahkamah bersetuju dengan Mahkamah Tinggi bahawa sebagai D tambahan kepada fakta hubungan seksual semasa tempoh mengandung, orang yang membuat tuntutan paterniti boleh mengemukakan keterangan tambahan lain, lisan atau dokumentari, untuk menyokong dakwaan tersebut, sebelum mahkamah memberikan perintah agar pihak-pihak berkenaan, iaitu anak tersebut dan yang didakwa sebagai E bapa kandung, menjalani ujian DNA untuk menentukan paterniti. Mahkamah seterusnya bersetuju dengan Mahkamah Tinggi dalam merujuk kepada s 57(2) Akta Keterangan 1950 untuk bergantung pada jurnal perubatan yang dihormati untuk menentukan tempoh mengandung. Berdasarkan dapatan Mahkamah Tinggi, tempoh F mengandung dalam kes ini adalah antara 13 September 2007 hingga 20 Oktober 2007 (lihat perenggan 17–18).

(2) Hakim bicara yang bijaksana mendapati bahawa responden telah membuktikan berdasarkan imbangan kebarangkalian bahawa: (a) dia G mempunyai hubungan seksual intim dengan perayu pertama sebelum dan semasa perkahwinannya dengan perayu kedua sehingga Januari 2014; (b) dia telah melakukan persetubuhan tanpa perlindungan dengan perayu pertama semasa tempoh mengandung anak tersebut; (c) perayu pertama telah memberitahunya dan ibunya bahawa dia ialah bapa H kepada anak tersebut; (d) dia mempunyai akses kepada dan terlibat dalam kehidupan anak tersebut sejak kelahirannya sehingga Disember 2013; dan (e) dia telah memberikan wang kepada perayu pertama untuk nafkah anak tersebut sehingga perayu pertama menutup akaun Maybanknya pada Ogos 2014. Ini pada asasnya adalah dapatan-dapatan I fakta oleh hakim bicara dan mahkamah rayuan sepatutnya tidak terburu-buru mengganggu dapatan-dapatan fakta tersebut melainkan jika telah ditunjukkan bahawa hakim bicara adalah jelas salah. Mahkamah tidak mendapati hakim bicara telah membuat apa-apa kesilapan dalam dapatannya bahawa responden mempunyai hubungan

seksual dengan perayu pertama semasa tempoh mengandung (lihat perenggan 26–27).

(3) Mahkamah bersetuju dengan dapatan-dapatan dan keputusan hakim Mahkamah Tinggi yang bijaksana mengenai pemakaian prinsip undang-undang biasa bahawa sebagai 'parens patriae' Mahkamah Tinggi mempunyai kuasa sedia ada ke atas seorang kanak-kanak untuk membuat apa-apa perintah demi kepentingan terbaik kanak-kanak tersebut, dan ini termasuk kuasa untuk memerintahkan agar seseorang kanak-kanak menjalani ujian DNA bagi tujuan menentukan bapanya. Prinsip undang-undang biasa ini adalah terpakai di Malaysia menurut s 3(1) Akta Undang-Undang Sivil 1956 yang membenarkan penggunaan undang-undang biasa England setakat 7 April 1956 tertakluk kepada had yang dinyatakan dalam peruntukan undang-undang (lihat perenggan 40–41).

(4) Mahkamah terikat dengan doktrin stare decisis untuk menggunakan prinsip dalam kes Mahkamah Rayuan *CAS v MPPL & Anor* [2019] 4 MLJ 243. Oleh itu mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa adalah untuk kepentingan terbaik anak tersebut untuk mengetahui siapa bapa kandungnya. Hak kanak-kanak untuk mengenali ibu bapa kandungnya kini diiktiraf di peringkat antarabangsa sebagai hak asas yang sangat penting kepada kanak-kanak. Kanak-kanak mempunyai hak untuk mengetahui kebenaran berkenaan asal usulnya, dan dalam hal ini, di mana sesuai Mahkamah Tinggi perlu menggunakan bidang kuasa sedia ada 'paren patriae' untuk membantu kanak-kanak itu mengetahui kebenaran tersebut. Mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa berdasarkan fakta dan keadaan kes, ini adalah kes yang sesuai (lihat perenggan 42–43).]

Cases referred to

B (BR) v B (J) and another [1968] 3 WLR 566; [1968] 2 All ER 1023, CA (refd)

Bhapani Prasad Jena v Convenor Secretary, Orissa State Commission for Women and another (2010) 8 SCC 633, SC (refd)

CAS v MPPL & Anor [2019] 4 MLJ 243; [2018] 8 AMR 525; [2019] 2 CLJ 454, CA (folld)

L (an infant), In re [1967] 3 WLR 1645; [1968] 1 All ER 20, CA (refd)

Lau Zhan Chen v Makoto Togase & Ors [1994] MLJU 344; [1995] 1 CLA 841; [1995] 1 AMR 281, HC (refd)

Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik [2013] 4 MLJ 272; [2013] 4 CLJ 107; [2013] 2 AMR 628, HC (refd)

Lim Hooi Teik v Lee Lai Cheng (sebagai sahabat wakil Lee Chee Zheng dan untuk dirinya) [2015] MLJU 2200; [2016] 3 CLJ 529, CA (consd)

MPPL & Anor v CAS (02(f)-14-03 of 2018(W)) (unreported), FC (refd)

Mahabir Prasad v Mahabir Prasad [1981] 2 MLJ 326; [1981] CLJ Rep 65; [1981] CLJ 124A, FC (refd)
Peter James Binsted v Juvencia Autor Partosa [2000] 2 MLJ 569; [2000] 2 CLJ 906, HC (refd)
Selvi Vijayalakshmi v A Sankaran and another [2017] 4 MLJ 463, HC (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Courts of Judicature Act 1964 s 24(d)
Deoxyribonucleic Acid (DNA) Identification Act 2009
Evidence Act 1950 ss 57(2), 112
Family Law Reform Act 1969 [UK] s 20(1)
Rules of Court 2012 O 14A

Appeal from: *CAS v MPPL & Anor* [2022] 12 MLJ 135 (High Court, Kuala Lumpur)

Kiran Dhaliwal (with YN Foo and Yu Yi Lin) (YN Foo & Partner) for the appellant.
Honey Tan Lay Ean (with Seira Sacha Abu Bakar) (Seira & Sharizad) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the decision of the High Court in Malaya at Kuala Lumpur allowing the respondent's application for a DNA test to be conducted to determine paternity of a child, that the respondent claims to be the biological father of, despite the mother of the child, the first appellant, being lawfully married to the second appellant at the time the child was born.

BACKGROUND FACTS

[2] The appellants are husband and wife. They were lawfully married on 3 March 2007. Whilst being married to the second appellant, the first appellant gave birth to a child ('child C') on 23 June 2008. However, despite the child being born during the subsistence of the first appellant's' marriage to the second appellant, the respondent claimed that he was the biological father of the child, and not the second appellant.

[3] The respondent alleged that he has had sexual relations with the first appellant from sometime before her marriage to the second appellant, and that their sexual relations continued during the first appellant's marriage to the second appellant, and that it ended only sometime in or around January 2014.

The respondent further stated that he was allowed access to child C since her birth until sometime in December 2013, and that he had provided monies to the first appellant for the child's maintenance until sometime in August 2014.

[4] At the material time, both the second appellant and respondent were airline pilots, albeit with different airlines. Whilst, the first appellant was a flight stewardess working with the same airline as that of the respondent. The child is now almost 15 years old.

[5] In order to determine paternity, the respondent sought an order from the High Court to have a forensic DNA test conducted to compare and match the respondent's DNA with that of child C.

[6] The appellants strenuously opposed the respondent's claim.

THE APPELLANTS' O 14A APPLICATION

[7] The appellants filed an application under O 14A of the Rules of Court 2012 seeking dismissal of the respondent's application on grounds that pursuant to the presumption of legitimacy in s 112 of the Evidence Act 1950, the fact of child C being born during the subsistence of a valid marriage between the appellants is conclusive proof that child C is the legitimate child of the first and second appellants. The High Court allowed the appellants' O 14A application and summarily dismissed the originating summons. See: *CAS v MPPL & Anor* [2019] 4 MLJ 243; [2018] 8 AMR 525; [2019] 2 CLJ 454 for the judgment of the High Court.

[8] However, the Court of Appeal reversed that decision on appeal and held that legitimacy and paternity are two distinct, though, interrelated concepts. The Court of Appeal further held that legitimacy is a question of law, whilst paternity is a question of fact. See: *CAS v MPPL & Anor* [2019] 4 MLJ 243; [2018] 8 AMR 525; [2019] 2 CLJ 454.

THE HIGH COURT TRIAL AND DECISION

[9] The matter was then remitted to the High Court for determination of the issue of paternity after full viva voce evidence. The appellants' obtained leave to appeal to the Federal Court. However, having heard the appeal the Federal Court affirmed the Court of Appeal's decision. See: *MPPL & Anor v CAS* (02(f)-14-03 of 2018(W)) (unreported) — 29 January 2019.

[10] The High Court then directed the originating summons be converted to a writ action to enable the factual disputes to be determined by way of viva voce evidence, as ordered by the Court of Appeal.

[11] After full trial of the action, the High Court allowed the respondent's application and ordered that child C be brought to Hospital Tunku Azizah in Kuala Lumpur for the DNA test to be conducted in order to ascertain and confirm the child's paternity. The High Court further ordered that in the event the DNA test showed the respondent to be the biological father of child C then a declaration shall issue to confirm the same. The High Court also granted further ancillary reliefs as prayed for by the respondent in the statement of claim.

THE APPEAL BEFORE THIS COURT

[12] Dissatisfied, the appellants appealed against that decision to the Court of Appeal. We had unanimously dismissed the appeal for the following reasons.

[13] The main issues in this appeal were:

(a) whether the respondent had made out a prima facie case that he had sexual relations with the first appellant during the period child C was conceived ('the conception period');

(b) whether the High Court had the power to order a blood test on child C to determine paternity via DNA testing; and if so

(c) whether it is in child C's welfare and best interests to order the DNA test.

First issue — Whether the respondent had sexual intercourse with the first appellant during the conception period?

[14] The respondent bears the burden of proof to establish this fact on a balance of probabilities.

[15] The Court of Appeal in *Lim Hooi Teik v Lee Lai Cheng (sebagai sahabat wakil Lee Chee Zheng dan untuk dirinya)* [2015] MLJU 2200; [2016] 3 CLJ 529 held that the plaintiff in seeking to establish paternity by way of a DNA test must first establish the fact of an intimate sexual relationship between the mother of the child and the alleged putative biological father. The court further held that once that fact is established then the court would consider whether an order to compel the relevant parties to undergo a DNA test is warranted in the circumstances of the facts of the case.

[16] The learned trial judge had relied on the dicta in *Lim Hooi Teik*, where it was held that proof of sexual relations between the applicant mother and alleged biological father was sufficient for the court to order a DNA test to determine paternity of a child. We accept that the roles are reversed in the present case before us, in that, unlike in *Lim Hooi Teik,* in the present case the alleged biological father is seeking to establish paternity. Nevertheless, the

learned trial judge was of the view that the applicable principle as stated by this court in *Lim Hooi Teik* is equally applicable when it is the man who is seeking to establish paternity. And we agree with that view.

[17] In this regard, the learned trial judge added a further requirement to that the acid test, that is when the person asserting paternity is the putative father, then he must go a step further to establish a prima facie case that he and the child's mother not only had sexual relations prior to the child's birth, but that the sexual relations occurred during the period when the child was conceived, ie the conception period. We do not find any reason to disagree with that pronouncement, for it accords well with the science of conception. We also agree with the High Court that in addition to the fact of sexual relations during the conception period, the person asserting that claim of paternity may produce other additional evidence, oral or documentary, to support that assertion, before the court grants the order that the relevant parties, ie the child and the putative biological father, undergo DNA testing to determine paternity.

[18] Hence, the crucial question to be asked and answered is: What was the conception period for child C? To determine this issue, the learned trial judge had referred to s 57(2) of the Evidence Act 1950, which provides that in matters of science the court may refer to appropriate books or documents of reference. And in consonant with this statutory provision she had relied on several articles on the subject found in respectable medical journals. From these journal articles, she concluded that child C's conception period was between 13 September 2007 and 20 October 2007. Having considered the scientific theory contained in these journal articles, as explained by the trial judge in paras 29–34 of the grounds of judgment, we concur with the learned trial judge's finding that the conception period was between 13 September 2007 and 20 October 2007.

[19] Hence, the respondent as plaintiff would have to establish on a balance of probabilities that there were sexual relations between the respondent and the first appellant during the conception period of child C, ie between 13 September 2007 and 20 October 2007.

[20] At trial, the respondent testified and called four other persons as his witnesses, whilst both the appellants testified for themselves. Apart from the oral testimony of these witnesses, there were also documentary evidence in the form of emails and WhatsApp messages between the first appellant and the respondent, as well as photographs and videos tendered at trial.

[21] Having analysed the evidence, the learned trial judge found the first appellant to have 'demonstrably told lies' in presenting her case. In her

pleadings and in all her affidavits she denied having had sexual relations with the respondent. However, in her oral testimony she admitted having sexual relations. The first appellant was also found to have lied to her husband, the second appellant about her relationship with the respondent. The first appellant admitted during examination under oath that she had carried on her extra-marital relationship with the respondent for more than six years and that she had brought the respondent into her matrimonial home since child C was two weeks old without the second appellant's knowledge. Thus, the learned judge scrutinised the first appellant's testimony with great care and tested it against the whole of the evidence presented in the case.

[22] The High Court found that the respondent had discharged the burden of proof by adducing sufficient evidence to tilt the overall probabilities of the case in favour of the respondent. The first appellant had in her testimony admitted to sexual relations with the respondent prior to and during the subsistence of her marriage to the second appellant. The respondent had testified that he and the first appellant had unprotected sexual intercourse in the months of August, September and October 2007, and that they had continued to have regular sexual relations with the intention of starting their own family. According to the respondent the first appellant had indicated to him that she was prepared to divorce the second appellant in order to start their own family. The respondent added that every time they had sexual intercourse during this period, he had ejaculated into her. The respondent further testified that sometime in January 2008 the first appellant informed him that she was pregnant with his child. The respondent's mother (PW3) had testified that the first appellant had told her that the respondent was the father of the child.

[23] However, the first appellant denied that she had sexual relations with the respondent during the months of August, September and October 2007. She further denied that she had told the respondent that he was the father of the child. Nevertheless, the first appellant admitted that she had informed the respondent's mother that the respondent was the child's father.

[24] The learned trial judge had carried out a detailed and lengthy analysis of the evidence before concluding that the first appellant was not a witness of truth and that she was not telling the truth, and made a finding that on a balance of probabilities the respondent did have sexual relations with the first appellant during the conception period. We do not find any reason to disagree with that finding. This factual finding is well supported by the overall evidence, and is borne out by the thorough analysis of the evidence carried out by the learned High Court judge.

[25] Additionally, there is also evidence that the respondent had paid monies to the first appellant as maintenance for child C until the account to which the

payments were made was closed by the first appellant sometime in December 2014. A monthly sum of RM1,000 was paid into the first appellant's Maybank account beginning from sometime in 2010 until the account was closed in December 2014. This fact was admitted by the first appellant. There was also evidence of the respondent spending time with child C and partaking in activities with the child including celebrating birthdays and also taking outstation trips.

[26] From the analysis of the pleadings and taking into account the totality of evidence, and further having assessed the credibility of the witnesses, the learned trial judge found that the respondent had proved on a balance of probabilities that:

(a) he had intimate sexual relations with the first appellant prior to and during her marriage to the second appellant until January 2014;

(b) he had unprotected sexual intercourse with the first appellant during child C's conception period, particularly in September 2007;

(c) the first appellant had told him and his mother that he was the father of child C;

(d) he had access to and was involved in child C's life since her birth until December 2013; and

(e) he had provided the first appellant monies for the child's maintenance until she closed her Maybank account sometime in August 2014.

[27] These are essentially findings of fact by the trial judge and an appellate court is slow to disturb such findings of fact unless it is shown that the trial judge was plainly wrong. We do not find the trial judge to have made any error in her finding that the respondent did have sexual relations with the first appellant during the conception period.

Second issue: Whether the courts have the power to order DNA test on a child to determine paternity?

[28] Presently, the only scientific method available to determine paternity of a child is by forensic DNA matching. The Deoxyribonucleic Acid (DNA) Identification Act 2009 ('DNA Act') is the specific statute enabling the taking of 'intimate' and 'non-intimate' samples from a person for the limited purposes stated in that Act. However, the DNA Act does not provide for the taking of samples in civil cases for the purposes of resolving paternity disputes, and there are no other specific provisions in any other statutes empowering the civil courts to order a DNA test to establish paternity.

[29] The appellants, therefore, argue that the Malaysian courts do not have

A the power to order a forensic DNA analysis by taking blood sample from a child to determine paternity in civil proceedings. The respondent on the other hand contends that it is in the best interest of child C to know who her biological father is, and that the High Court as parens patriae has the inherent jurisdiction and power to order a forensic DNA analysis for the purposes of determining
B paternity.

[30] The courts in Malaysia have since 1994 relied on DNA matching as admissible evidence to determine paternity. In *Lau Zhan Chen v Makoto Togase & Ors* [1994] MLJU 344; [1995] 1 CLA 841; [1995] 1 AMR 281 both the
C mother and the putative biological father had volunteered to have samples taken from their body to determine paternity of the child. The test showed that the first respondent in that case was the biological father of the child with a 99.96 probability. Hence, the DNA test has a very high degree of accuracy, and
D is the test of choice not only in Malaysia but in many other jurisdictions to determine paternity of a child.

[31] However, the High Court in two subsequent cases, namely: *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569; [2000] 2 CLJ 906 and *Lee*
E *Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik* [2013] 4 MLJ 272; [2013] 4 CLJ 107; [2013] 2 AMR 628 refused an order to compel the putative biological father to give samples for forensic DNA analysis. In *Peter James Binstead* the court held that 'there is no general power provided by legislation or through common law for any court in
F Malaysia to order a person to undergo a test to ascertain paternity'. And in *Lee Lai Cheng* the court held that it cannot invoke its inherent jurisdiction and powers as it was of the view that the same are 'limited to prevent injustice or prevent abuse of process of the court'. The High Court in *Lee Lai Cheng* took
G a narrow interpretation of the inherent jurisdiction of the court in matters such as this.

[32] However, in the present case, the respondent had submitted before the High Court that under s 24(d) of the Courts of Judicature Act 1964 ('the CJA
H 1964'), the High Court as parens patriae has the power to order a child to undertake a DNA test to determine the child's paternity.

Section 24(d) of the CJA 1964 reads:

24. Without prejudice to the generality of section 23 the *civil jurisdiction of the High*
I *Court shall include:*

...

(d) *jurisdiction* to appoint and control guardians of infants and *generally over the persons and property of infants*

[33] The Federal Court had in *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326; [1981] CLJ Rep 65; [1981] CLJ 124A held that when it came to 'hearing a custody case regarding infants within the jurisdiction', the High Court 'is invested with an inherent jurisdiction derived from the Crown's prerogative as parens patriae'.

[34] In this regard, it is worth noting that in England s 20(1) of the Family Law Reform Act 1969 ('the FLRA') empowers the courts to give orders or directions for blood tests to be used to ascertain paternity in civil proceedings. And before the enactment of the FLRA the English Court of Appeal had held that the High Court under its inherent jurisdiction as parens patriae has under common law the power to order a blood test of a child to ascertain paternity when that is in issue. The cases of *In re L (an infant)* [1967] 3 WLR 1645; [1968] 1 All ER 20 and *B (BR) v B (J) and another* [1968] 3 WLR 566; [1968] 2 All ER 1023, are authorities for that proposition.

[35] In *In re L (an infant)* the facts are very similar to our case, and the issue was who was the father of the child; the mother's husband or her lover with whom she was in an adulterous relationship. Lord Denning speaking for the Court of Appeal said 'in proceedings relating to the custody of a child, any judge of the High Court can order a test of the child's blood. *So also in a paternity issue, or any proceedings where it is in the best interests of the child to have its paternity settled one way or the other, the court can order a blood test*'. The English Court of Appeal further held that the High Court's inherent jurisdiction over children 'derives from the right and duty of the Crown as parens patriae to take care of those who are not able to take care of themselves'.

[36] And in the subsequent case of *B (BR) v B (J)*, the English Court of Appeal held that the jurisdiction to order a blood test is not limited to custody cases, but is unlimited and extends to all cases where it is in the best interests of the child to order a blood test. Lord Denning in his judgment in that case said: 'The conclusion of the whole matter is that a *judge of the High Court has power to order a blood test whenever it is in the best interests of the child*. The judges can be trusted to exercise this discretion wisely, I would set no limit, condition or bounds to the way in which judges exercise their discretion. The object of the court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires'.

[37] It is worth noting that the principle enunciated in both these English cases, ie that the High Court as parens patriae has inherent jurisdiction and power to order a blood test of a child to ascertain paternity, is a rule of antiquity recognised in common law.

[38] In India too, the Supreme Court had in several cases held that the High Court has the inherent jurisdiction to order a DNA test to determine a child's paternity, and that the discretionary power must however be exercised sparingly in only the most deserving of cases where there is a strong prima facie case for ordering such a test. See: *Bhapani Prasad Jena v Convenor Secretary, Orissa State Commission for Women and another* (2010) 8 SCC 633. And the Indian Courts' power to order a DNA test to determine paternity was succinctly summarised by the Madras High Court in *Selvi Vijayalakshmi v A Sankaran and another* [2017] 4 MLJ 463 (Madras Law Journal). These cases have high persuasive value.

[39] The common thread in the English and Indian authorities on the subject is that the High Courts have the power to use their inherent jurisdiction to fill legislative voids.

[40] The learned trial judge had considered these English case authorities and had applied this English common law principle of antiquity that the High Courts have the inherent jurisdiction as parens patriae to make any order it deems appropriate in the best interest and welfare of a child, and that this includes an order to undergo a blood test to determine the child's paternity. This common law principle was the basis on which the English Court of Appeal had decided the cases of *In re L (an infant)* and *B (BR) v B (J)*. And we agree with the learned trial judge that this common law principle would be applicable in Malaysia by virtue of s 3(1) of the Civil Law Act 1956 which allows for the import of the common law of England as at 7 April 1956 subject to the limitations spelled out in that statutory provision.

[41] Thus, we concur with the findings and ruling of the learned High Court judge on the application of the common law principle that as parens patriae the High Court had general inherent powers over a child to make any order that would be in the best interest of the child, and that this would include the power to order that a child undertake a DNA test for the purposes of determining his or her paternity. In this regard, we do not find any reason to disturb that pronouncement of the law by the learned trial judge, and we affirm it as the applicable law.

Third issue: Whether it is in the best interests and welfare of child C for the DNA paternity test be ordered?

[42] We also concur with the finding of the learned trial judge that following the Court of Appeal's pronouncement in *CAS v MPPL & Anor (No 1)*, the presumption of legitimacy in s 112 of the Evidence Act 1950 does not bar inquiries into the paternity of a child. This court held in that case that it is in the best interests of a child to know his or her biological parents. Nallini JCA

said: 'In determining whether a paternity test ought to be ordered, the court must have regard to the best interests of the child. 'Best Interests' here refers to the right of the child to know who his or her biological parents are. The court ought not to be concerned solely or wholly with fears of 'illegitimising the child'.'

[43] We are bound by the doctrine of stare decisis to apply that principle. Hence, we agree with the learned trial judge that it would be in the best interests of child C to know who her biological father is. The right of a child to know his or her biological parents is now internationally recognised as a basic right of critical importance to a child. The child has a right to know the truth of his or her origin, and in this regard, where appropriate the High Court must exercise its inherent jurisdiction of parens patriae to assist the child to know that truth. We agree with the learned trial judge that given the facts and circumstances of the case this is such an appropriate case.

OUR DECISION

[44] In the premise of the above, the appeal is dismissed and the order of the High Court is affirmed. We order that parties bear their own costs.

Interim stay

[45] Learned counsel for the appellants sought a stay of the order of this court as well as the High Court order pending disposal of their application for leave to appeal to the Federal Court being heard and disposed. Learned counsel for the respondent did not object to the stay application. Hence, we ordered that the High Court order and the order of this court be stayed pending the hearing and disposal of the appellants' leave application to the Federal Court which shall be filed within 14 days of date of pronouncement of the order of this court.

Appeal dismissed; order of High Court affirmed; stay of High Court's order and Court of Appeal's order allowed pending disposal of appellants' leave application to Federal Court.

Reported by Dzulqarnain Ab Fatar